United States Department of Labor
Employees' Compensation Appeals Board

A.L., Appellant	)	
and	)	**Docket No. 17-0909**
	)	**Issued: December 22, 2017**
U.S. POSTAL SERVICE, HYANNIS POST OFFICE, Hyannis, MA, Employer	)	

Appearances:
Benjamin Zimmerman, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 20, 2017 appellant, through counsel, filed a timely appeal from a February 3, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] With his appeal request, counsel, submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated July 25, 2017, the Board exercised its discretion and denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 17-0909 (issued July 25, 2017).

[3] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish permanent aggravation of left hip arthritis, left trochanteric bursitis, and left knee arthritis causally related to accepted factors of his federal employment.

On appeal counsel contends that the second opinion physician's report establishing only temporary aggravation of appellant's left hip arthritis, left trochanteric bursitis, and left knee arthritis was speculative and entitled to no weight as OWCP posed legally and medically incorrect questions and as he failed to rely on the statement of accepted facts (SOAF). He also contends that OWCP should not have found that its medical adviser represented the weight of the medical evidence in accepting only temporary aggravation of left hip arthritis, left trochanteric bursitis, and left knee arthritis.

FACTUAL HISTORY

On January 9, 2015 appellant, then a 57-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that his diagnosed left knee and left hip arthritis were accelerated by his work duties. He described his employment duties beginning in 1989 including walking more than five miles a day, a work-related avulsion fracture of his right hip,[4] and daily knee soreness. Appellant noted that in 2006 he performed a mounted route which aggravated his ongoing right knee condition due to driving. In 2010 he performed dismount, curbside, and apartment deliveries. Appellant underwent surgery for a right knee meniscal tear.

In a November 5, 2014 report, Dr. Byron V. Hartunian, an orthopedic surgeon, noted reviewing appellant's position description and the description of his work duties. Appellant reported a preexisting left knee condition beginning with a ski accident in 1972 which required anterior cruciate ligament reconstruction and meniscal surgery. He had increasing discomfort at work in 2010 and received knee injections. Appellant developed left hip pain in 2012 which was diagnosed as bursitis and early arthritis. A February 19, 2013 magnetic resonance imaging scan showed bilateral acetabular osteophytes and femoral head osteophytes worse on the right. Appellant walked without a limp, but could squat to only 50 percent of normal because of restricted motion at the hips and knees. He had palpable effusion of the left knee with moderate tenderness to palpation along the medial joint. Appellant had crepitus during range of motion with flexion of 100 degrees and extension of 0 degrees. Dr. Hartunian examined appellant's left hip and found no tenderness, but limited range of motion. He reviewed December 2, 2013 x-rays and found narrowing of the medial femoral-tibial joint to three millimeters of cartilage in the left knee and degenerative changes with osteophyte formation in the medial and patellofemoral compartments. An October 24, 2014 left hip x-ray showed narrowing of the left formal-acetabular joint to three millimeters of cartilage with mild degenerative changes.

Dr. Hartunian diagnosed primary left knee joint arthritis and left hip arthritis. He described arthritis as a failure and loss of articular cartilage surface. Dr. Hartunian opined that

[4] Appellant has other claims before OWCP. OWCP File No. xxxxx869 was accepted for subluxation of L5. OWCP File No. xxxxxx102 was accepted for contusion to the coccyx and OWCP File No. xxxxxx819 was accepted for lumbar strain. These other claims are not before the Board on the present appeal.

impact loading resulting from repeated local stresses accelerated the progression of arthritis through a process of chronic inflammation. He noted that appellant's work required constant and repetitive walking, squatting, stooping, climbing, bending, lifting, carrying, stair climbing, and twisting. Dr. Hartunian opined that these impact loading activities exerted repeated local stresses to his left leg resulting in chronic inflammation. He reported, "The inflammation causes a loss of proteoglycans which are responsible for cartilage resilience and their loss results in a stiffer material that is more easily damaged by 'wear and tear.'" Dr. Hartunian concluded that appellant's job activities were a significant contributing factor to "the development and progression of his left lower extremity arthritis."

On March 20, 2015 OWCP requested that appellant provide additional medical evidence supporting causal relationship between his diagnosed conditions and his employment. It afforded him 30 days to respond. Appellant did not respond. By decision dated April 27, 2015, OWCP denied his occupational disease claim.

On April 30, 3015 OWCP reopened appellant's claim on its own motion and again requested additional medical evidence. Counsel responded on May 29, 2015 and submitted additional evidence. He contended that Dr. Hartunian's report was sufficient to establish appellant's occupational disease claim.

OWCP referred appellant and forwarded a SOAF and a list of questions to a second opinion examiner, Dr. Christopher B. Geary, a Board-certified orthopedic surgeon. In his October 19, 2015 report, Dr. Geary indicated that he had reviewed the SOAF and the medical evidence submitted. He noted appellant's nonwork-related knee surgery and reported that he had a right total hip arthroplasty on July 13, 2015. Dr. Geary indicated that appellant currently had a mildly antalgic gait favoring his right leg. He noted that he felt that appellant's work activities caused a temporary traumatic aggravation of his underlying hip and knee arthritis. Dr. Geary indicated that he believed that the aggravation of appellant's underlying left hip arthritis, left trochanteric bursitis, and left knee arthritis was temporary and that he expected the aggravation to cease within six to eight weeks after appellant's federal employment ended. He found no causality or acceleration of appellant's conditions.

By decision dated October 29, 2015, OWCP accepted appellant's claim for temporary aggravations of left hip arthritis, left trochanteric bursitis, and left knee arthritis.

Counsel requested reconsideration on September 12, 2016. He contended that Dr. Geary's report was speculative regarding the time at which the aggravation of appellant's right hip arthritis would cease. Counsel further argued that appellant had no plans to stop work and had ongoing work activities such that his work-related aggravation must be considered permanent. He noted that Dr. Geary was not provided with the contribution standard of causation or given the full definition of acceleration as defined by OWCP procedures.

Appellant also submitted a report from Dr. Hartunian dated September 8, 2016. Dr. Hartunian noted that there was no medically accepted definition of "the ordinary course" or "natural progression" of osteoarthritis (OA). He asserted that research since the mid-1900's had established that "the significant and oftentimes predominant contribution of environmental factors to the development and progression" of arthritis. Dr. Hartunian also reported that specific

ergonomic stresses such as knee bending, kneeling, and squatting may constitute long-term stresses leading to OA. He opined that, due to the nature of the disease, all aggravations of arthritis must be permanent. Dr. Hartunian noted that degenerative arthritis was the loss of articular cartilage and that aggravation of arthritis contributed to the deterioration of the articular cartilage. He noted that, once lost, articular cartilage could never be regained or revert back to a decreased level of severity.

OWCP referred the medical record to an OWCP medical adviser on January 20, 2017. In a report dated January 29, 2017, OWCP's medical adviser reviewed the SOAF and medical records. He disagreed with Dr. Hartunian's findings and conclusions regarding the causal relationship between heavy work and OA of the hip or bursitis of the hip. The medical adviser also disagreed that no aggravation of OA could be temporary. He opined that the symptoms of OA waxed and waned and that in his experience patients could return to their preinjury level of activity and symptomatology. OWCP's medical adviser concluded, "The fact that the OA progresses as the claimant continues his work activities does not in and of itself mean that the claimant suffered a permanent aggravation of the OA of the affected joint in my opinion."

By decision dated February 3, 2017, OWCP denied modification of its prior decisions finding that the medical evidence of record was not sufficiently rationalized to establish permanent accelerations or aggravations of the work-related conditions of left hip arthritis, left trochanteric bursitis, and left knee arthritis.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[6]

OWCP's regulations define an occupational disease as a condition produced by the work environment over a period longer than a single workday or shift.[7] To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated

[5] *Supra* note 3.

[6] *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

[7] 20 C.F.R. § 10.5(q).

differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.

A medical report is of limited probative value on a given medical question if it is unsupported by medical rationale.[8] Medical rationale includes a physician's detailed opinion on the issue of whether there is causal relationship between the claimant's diagnosed condition and the implicated employment activity. The opinion of the physician must be based on a complete factual and medical background of the claim, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and specific employment activity or factors identified by the claimant.[9] The belief of a claimant that a condition was caused or aggravated by the employment is insufficient to establish causal relation.[10]

OWCP's procedures define an aggravation as when a preexisting condition is worsened, either temporarily or permanently, by an injury arising in the course of employment.[11] A temporary aggravation is defined as a condition that involves a limited period of medical treatment or disability, after which the employee returns to his previous physical status. A permanent aggravation is defined as a condition that will persist indefinitely due to the effects of the employment-related injury, or when a condition is materially worsened such that it will not revert to its previous level of severity. In order to establish that permanent aggravation has occurred in a physical disability case, there should be objective evidence of a physiological change in the claimant's preexisting condition. OWCP procedures define an acceleration as when an employment-related injury or illness hastens the development of an underlying condition and the ordinary course of the disease does not account for the speed with which a condition develops.[12]

It is well established that, where employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for periods of disability related to the aggravation.[13] Where the medical evidence supports an aggravation or acceleration of an underlying condition precipitated by working conditions or injuries, such disability is compensable.[14] However, the normal progression of untreated disease cannot be stated as an aggravation of a condition merely because the performance of normal work duties reveal the

[8] *T.F.*, 58 ECAB 128 (2006).

[9] *A.D.*, 58 ECAB 149 (2006).

[10] *Lourdes Harris*, 45 ECAB 545, 547 (1994).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.3.c (June 2015).

[12] *Id.*

[13] *A.C.*, Docket No. 08-1453 (issued November 18, 2008); *see Thomas N. Martinez*, 41 ECAB 1006 (1990); *William D. Bryson*, 32 ECAB 860 (1981).

[14] *A.C., id.*; *see Grace K. Johnson*, 8 ECAB 547 (1956).

underlying condition.[15] For the conditions of employment to bring about an aggravation of preexisting disease, the employment must be such as to cause acceleration of the disease or to precipitate disability.[16]

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.[17] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[18]

ANALYSIS

The Board finds that this case is not in posture for a decision.

Appellant's attending physician, Dr. Hartunian, provided two reports addressing the impact of appellant's accepted employment duties on his diagnosed left hip arthritis, left trochanteric bursitis, and left knee arthritis. In his initial report, he provided a detailed explanation of the process by which impact loading resulting from repeated local stresses sustained during appellant's work duties accelerated the progression of arthritis through a process of chronic inflammation. Dr. Hartunian opined that these impact loading activities exerted repeated local stresses to appellant's left lower extremity resulting in chronic inflammation. He reported, "The inflammation causes a loss of proteoglycans which are responsible for cartilage resilience and their loss results in a stiffer material that is more easily damaged by 'wear and tear.'" Dr. Hartunian concluded that appellant's job activities were a significant contributing factor to the development and progression of his left lower extremity arthritis. In his second report, he opined that due to the nature of the disease all aggravations of arthritis must be permanent. Dr. Hartunian noted that degenerative arthritis was the loss of articular cartilage and that aggravation of arthritis contributed to the deterioration of the articular cartilage. He pointed out that, once lost, articular cartilage could never be regained or revert back to a decreased level of severity.

OWCP undertook further development of appellant's claim by referring him to Dr. Geary for a second opinion evaluation. Dr. Geary opined that appellant's work activities caused only a temporary traumatic aggravation of his underlying left hip and knee arthritis. He expected the aggravation to have ceased within six to eight weeks after appellant's federal employment ended.

[15] *A.C., id.*; *Glenn C. Chasteen*, 42 ECAB 493 (1991); *Sylvia E. Loomis*, 1 ECAB 18 (1947).

[16] *A.C., id.*; *Compare John Watkins*, 47 ECAB 597 (1996); *Helen Morgan (Willis R. Morgan)*, 6 ECAB 633 (1954); *Jerry Hall*, 6 ECAB 522 (1954).

[17] *Supra* note 3 at § 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

[18] *R.C.*, 58 ECAB 238 (2006).

Dr. Geary provided a conclusory opinion that there was no causality or acceleration of appellant's conditions, but provided no explanation or basis for such an opinion.[19]

On January 29, 2017 OWCP's medical adviser reviewed the SOAF and medical records. He noted his disagreement with Dr. Hartunian's findings and conclusions regarding the causal relationship between heavy work and OA of the hip or bursitis of the hip, but provided no medical rationale in support opinion. The medical adviser also disagreed with Dr. Hartunian's finding that an aggravation of OA would inherently be permanent in nature. However, he provided only a conclusory opinion that arthritis could progress as appellant continued his work activities, but this did not mean that he suffered a permanent aggravation of OA.[20]

The Board finds that although Dr. Geary and OWCP's medical adviser provided opinions regarding causal relationship, neither physician supported his opinion with probative medical rationale.[21] Both physicians provided only conclusory responses with no rationale to support their opinions that there was no causal relationship between the accepted employment factors and the diagnosed conditions of left hip arthritis, left trochanteric bursitis, and left knee arthritis.[22] Furthermore, neither physician provided a well-reasoned explanation regarding how a progressed arthritic condition would be temporary in nature or return to a baseline condition once aggravated.

It is well established that proceedings under FECA are not adversarial in nature and that while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence in order to see that justice is done.[23] Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[24] After undertaking development by scheduling a second opinion examination with Dr. Geary on the issue of causal relationship, and requesting review of the second opinion report by an OWCP medical adviser, OWCP was responsible for obtaining rationalized medical opinion evidence as to causal relationship and the permanency of any work-related condition. As Dr. Geary did not provide such reasoned opinions, he should be requested to provide probative medical rationale in support of his opinions. If he is unable or unwilling to do so, a new second opinion examination should

[19] *J.D.*, Docket No. 14-2016 (issued February 27, 2015) (A mere conclusory opinion provided by a physician, without the necessary rationale explaining how and why the work factors were insufficient to result in diagnosed medical conditions, is insufficient to be granted the weight of the evidence).

[20] *Id*.

[21] *R.M.*, Docket No. 16-0147 (issued June 17, 2016).

[22] The Board notes that the opinions of Dr. Geary and OWCP's medical adviser are also of insufficient probative value to create a conflict in medical opinion.

[23] *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[24] *See B.C.*, Docket No. 15-1853 (issued January 19, 2016).

be scheduled in accordance with OWCP procedures.[25] Following this and any necessary further development on this issue of causal relationship, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds this case not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this opinion of the Board.

Issued: December 22, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

[25] OWCP's procedures provide that, if a second opinion specialist submits an opinion which is equivocal, lacks rationale, or fails to address the specified medical issues, the claims examiner should seek clarification or further rationale from that physician. When OWCP undertakes to develop the evidence by referring the case to an Office-selected physician, it has an obligation to seek clarification from its physician upon receiving a report that did not adequately address the issues that OWCP sought to develop. As such, the claims examiner should seek clarification from the referral physician and request a supplemental report to clarify specifically-noted discrepancies or inadequacies in the initial second opinion report. Only if the second opinion physician does not respond, or does not provide a sufficient response after being asked, should the claims examiner request scheduling with another physician. *See supra* note 11 at Chapter 2.810.9(j) (September 2010).